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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
7

8 CHRISTOPHER BASS,
9

10 Plaintiff,

11 v.
12 SEAN DAVID MORTON; DARYL WEBER;
13 MELISSA MORTON; 27 INVESTMENTS
14 LLC; MAGIC EIGHT BALL
15 DISTRIBUTING, INC.; VARJA
16 PRODUCTIONS LLC; DELPHI
17 ASSOCIATES INVESTMENT GROUP,
18
19 Defendants.

20 NO. CV-08-0253-EFS

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1 **A. Background**

2 The Court's July 6 and 20, 2009 Orders (Ct. Recs. [50](#) & [65](#)) set forth
3 the procedural history. The Court need not reiterate those procedural
4 facts except to highlight that the Court compelled the Morton Defendants
5 to answer Plaintiff's written discovery requests and informed the Morton
6 Defendants regarding the consequences of failing to respond to
7 Plaintiff's written discovery requests or to appear for the properly-
8 noted depositions. Notwithstanding the Court's Order and advisements and
9 Plaintiff's motion for sanctions, Defendant Melissa Morton failed to
10 appear for her properly-noted July 22, 2009 deposition, and Defendant
11 Sean David Morton failed to appear for his properly-noted July 23, 2009
12 deposition. (Ct. Recs. [72](#) & [73](#).) Furthermore, the Morton Defendants did
13 not produce answers or documents to Plaintiff's written discovery
14 requests. *Id.*

15 On July 16, 2009, the Morton Defendants filed a Motion to Dismiss
16 With Prejudice (Ct. Rec. [64](#)), seeking dismissal because the parties
17 allegedly entered into a Settlement Agreement. The Court cautioned the
18 Morton Defendants that until the Court ruled on a dismissal motion, they
19 were to abide by Court orders and respond to discovery, and that failure
20 to do so would result in sanctions. (Ct. Rec. [65](#) pp. 4-5.)

21 Also, the Morton Defendants faxed a letter on July 21, 2009, to
22 Plaintiff's counsel, with a courtesy copy to the Court, advising that
23 Plaintiff must pay the Morton Defendants a public appearance fee in
24 advance of their depositions. (Ct. Rec. [66](#).) This public appearance fee
25 demand directly contravenes the Court's advisement that a party has an
26

1 obligation to appear and to not impede, delay, or frustrate discovery
 2 without facing sanctions. (Ct. Rec. 65 p.3.)

3 **C. Authority and Application**

4 Federal Rule of Civil Procedure 37 gives a district court discretion
 5 to enter default judgment against a party who fails to attend its own
 6 deposition or serve answers to interrogatories. Fed. R. Civ. P. 37(d) (3)
 7 (turning to Fed. R. Civ. P. 37(b) (2) (A) (vi)); *see also Rio Props., Inc.*
 8 v. *Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002) (upholding a
 9 default judgment against a defendant that disregarded a discovery order);
 10 *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 353-54 (1909) (upholding
 11 a default judgment against a defendant who refused to produce documents).

12 A district court must consider the following five (5) factors when
 13 deciding whether default is the proper sanction for discovery
 14 noncompliance: "'1) the public's interest in expeditious resolution of
 15 litigation; 2) the court's need to manage its docket; 3) the risk of
 16 prejudice to the [moving party]; 4) the public policy favoring
 17 disposition of cases on their merits; and 5) the availability of less
 18 drastic sanction.'" *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112,
 19 1115 (9th Cir. 2004) (citation omitted). Where, as here, a Court Order
 20 is violated, "the first and second factors will favor sanctions and the
 21 fourth will cut against them." *Id.* The third and fifth factors are
 22 therefore dispositive. In addition to considering the above-referenced
 23 factors, a district court must find that the party's noncompliance is due
 24 to willfulness, fault, or bad faith. *Henry v. Gill Indus., Inc.*, 983
 25 F.2d 943, 946 (9th Cir. 1993).

26

1 The Ninth Circuit's multi-factor terminating sanction test is far
 2 from a mechanical checklist; rather, it functions as "a way for a
 3 district judge to think about what [discovery sanction is just]." *Valley*
 4 *Eng'rs v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998). A
 5 district court's decision to impose terminating sanctions will be
 6 reversed only if there is a "definite and firm conviction that the court
 7 committed a clear error of judgment in the conclusion it reached upon a
 8 weighing of the relevant factors." *Payne v. Exxon Corp.*, 121 F.3d 503,
 9 507 (9th Cir. 1997).

10 1. Prejudice

11 The Court finds that the Morton Defendants' failure to a) answer
 12 Plaintiff's interrogatories and requests for production and b) appear for
 13 deposition constitute sufficient prejudice to warrant default judgment.
 14 See *Adriana Int'l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir.
 15 1990) (finding that failure to produce documents as ordered is sufficient
 16 prejudice for default under Rule 37). Without discovery or deposition
 17 testimony from the Morton Defendants, Plaintiff's ability to prepare for
 18 trial is extremely hindered.

19 2. Less Drastic Sanction Availability

20 Before resorting to terminating sanctions, the district court must
 21 consider 1) what lesser sanctions were previously imposed, 2) why other
 22 lesser sanctions would be insufficient, and 3) whether the offending
 23 party is on notice about the possibility of default. *Brotby*, 364 F.3d at
 24 1116.

25 Although the Court has not previously awarded sanctions against the
 26 Morton Defendants, it clearly required the Morton Defendants to answer

1 Plaintiff's written discovery requests and advised the Morton Defendants
2 about the consequences of their failure to do so, as well as the
3 consequences for failing to appear at a properly-noted deposition.
4 Furthermore, the Morton Defendants were repeatedly warned regarding the
5 consequences of failing to abide by the Federal Rules of Civil Procedure
6 and the Local Rules, including imposition of default judgment - the
7 relief requested by Plaintiff's motion for sanctions. The Court
8 concludes that any sanction other than default judgment will be
9 insufficient. The Morton Defendants' continued willful withholding of
10 discovery prejudices Plaintiff's ability to prepare summary judgment
11 motions and for trial. There is nothing to indicate that this behavior
12 will change; therefore, lesser sanctions will not remedy this prejudice.

13 Finally, an explicit warning that the Court is considering entering
14 default judgment is unnecessary. See *CFTC v. Noble Metals Int'l*, 67 F.3d
15 766, 771-72 (9th Cir. 1995) (finding no explicit warning necessary when
16 harsh sanction of dismissal should not have surprised party who willfully
17 violated court's order); *Adriana*, 913 F.2d at 1413 (same). In any event,
18 the Morton Defendants were on notice when Plaintiff moved for default
19 judgment as a sanction.

20 3. Attorney Fees and Costs

21 Rule 37(d)(3) allows the Court to order the disobedient party - the
22 Morton Defendants - "to pay the reasonable expenses, including attorney's
23 fees, caused by the failure, unless the failure was substantially
24 justified or other circumstances make an award of expenses unjust." The
25 Morton Defendants' willful, noncompliant conduct is not substantially
26 justified. Plaintiff is entitled to fees and costs.

1 4. Summary

2 Given the Morton Defendants' willful failure to cooperate in
3 discovery and comply with the Court's Orders, it is futile for Plaintiff
4 and the Court to waste additional time and resources in an effort to
5 obtain the Morton Defendants' cooperation. Default judgment is the just
6 sanction. The Court grants Plaintiff's motion in part - default is
7 entered against the Morton Defendants. The Court holds in abeyance the
8 request for judgment because the Court is in need of briefing regarding
9 damages and attorneys fees and costs.

10 **C. Conclusion**

11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. Plaintiff's Motion for Discovery Sanctions Against Defendants
13 Sean David Morton and Melissa Morton (**Ct. Rec. 55**) is **GRANTED** (default
14 entered, as well as fees and costs to be awarded) **and HELD IN ABEYANCE**
15 (judgment) **IN PART**.

16 2. Plaintiff shall file a memorandum no later than **September 1,**
17 **2009**, setting forth a detailed legal and factual basis for all claimed
18 damages. The Court will review the memorandum and, if necessary, set a
19 hearing before entering default.

20 3. Plaintiff shall file a separate memorandum no later than
21 **September 1, 2009**, setting forth the attorneys' fees and costs attributed
22 to the discovery motion, sanctions motion, and depositions.

23 4. All pending pretrial and trial dates, relating to the Morton
24 Defendants, are **STRICKEN**.

25 5. The Morton Defendants' Motion to Dismiss With Prejudice (**Ct.**
26 **Rec. 64**) and other pending motions are **DENIED AS MOOT**.

IT IS SO ORDERED. The District Court Executive is directed to:

(A) Enter this Order and

(B) Provide copies to counsel and Defendants.

DATED this 3rd day of August 2009.

S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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